

**Hashim bin Majid v Param Cumaraswamy & Ors****A**

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5-22-1630-92

ANUAR J

10 MARCH 1993

**B**

**Arbitration** — *Stay of proceedings — Application — Defendants entered unconditional appearance — Whether defendants have the right to apply to court to stay proceedings — Whether entering an appearance was a step in the proceeding — Arbitration Act 1952 s 6*

**Arbitration** — *Stay of proceedings — Application — Allegation of fraud — Whether court may refuse stay of proceedings*

**C**

**Arbitration** — *Stay of proceedings — Application — Onus on party resisting application — Arbitration Act 1952 s 6*

**Partnership** — *Termination — Notice of termination — Whether null and void and wholly inoperative — Whether issue should be decided by arbitration or court*

**D**

**Partnership** — *Dissolution — Application for order of dissolution — Whether issue should be decided by arbitration or court*

**Civil Procedure** — *Arbitration — Arbitration clause — Whether action should be stayed and dispute referred to arbitration*

**E**

**Words and Phrases** — ‘Step in the proceeding’

The plaintiff and the defendants are partners of a firm of solicitors (‘the firm’). The parties entered into a written partnership agreement (‘the agreement’) dated 16 April 1990. It was contended by the defendants that the partners of the firm made a decision at a meeting held on 29 August 1992 to ask the plaintiff to retire from the partnership but the plaintiff told the defendants that he was not prepared to resign as suggested by them and that he would be prepared to resign as a senior partner of the firm within four years at a maximum from 31 December 1992. On 18 September 1992, the first defendant informed the plaintiff that the other partners of the firm were not prepared to agree to the stand taken by the plaintiff but the plaintiff, however, reiterated his position that he was not going to resign. On 30 September 1992, the plaintiff received a letter dated 18 September 1992 from the first defendant giving the plaintiff notice of termination of partnership under cl 5 of the agreement. On 14 December 1992, the plaintiff filed a writ of summons against the defendants claiming, *inter alia*, a declaration that the notice of termination dated 18 September 1992 against the plaintiff was null and void and wholly inoperative. The plaintiff further prayed for an order that the firm be ordered to be wound up. The defendants applied for an order under s 6 of the Arbitration Act 1952 (‘the Act’) that the present action be stayed and the dispute between the parties herein be referred to arbitration pursuant to the arbitration clause in the agreement.

**F****G****H****I**

**A** **Held**, dismissing the application:

(1) The court rejected the objection by the plaintiff's counsel that the defendants in entering an unconditional appearance to the present suit no longer have the right to apply to the court to stay the proceedings. Entering an appearance was not or could not be regarded as a step in the proceedings and in this instance, the defendants may apply to the court for stay of proceedings under s 6 of the Act.

**B**

(2) The issue in dispute was as regards to the validity of the notice of termination. It was a question of law which was not suitable to be decided by arbitration. The dispute should properly be decided by the court. Further, the court may refuse a stay of proceedings where the matter in dispute involves a charge of fraud against one of the parties to the arbitration agreement.

**C**

(3) The plaintiff had prayed for an order of dissolution of the partnership and such power to dissolve the partnership was not in the agreement neither was it mentioned in the arbitration clause. Therefore, the issue could not be decided by arbitration and should be decided by the court.

**D**

(4) Under s 6 of the Act, the court has a discretion either to stay or refuse a stay of proceedings pending arbitration. The onus was on the party who wish to object to any stay of proceedings to show why the arbitration clause should not be given effect. In the present case, the court was satisfied that the plaintiff has discharged his onus in demonstrating several reasons why the differences or issues should not be referred to arbitration.

**E**

**F** **[Bahasa Malaysia summary]**

Plaintif dan defendan-defendan merupakan rakan kongsi sebuah firma peguamcara ('firma itu'). Kedua-dua pihak telah mengikat suatu perjanjian perkongsian bertulis ('perjanjian itu') yang bertarikh 16 April 1990. Telah diujahkan oleh defendan-defendan bahawa rakan kongsi firma itu telah membuat keputusan dalam suatu mesyuarat pada 29 Ogos 1992 untuk meminta supaya plaintif bersara dari perkongsian itu tetapi plaintif telah memberitahu defendan-defendan bahawa beliau tidak bersedia bersara seperti yang diusulkan oleh mereka dan bahawa beliau hanya bersedia bersara sebagai rakan kongsi kanan firma itu dalam masa empat tahun maksimum dari 31 Disember 1992. Pada 18 September 1992, defendan pertama telah memberitahu plaintif bahawa rakan kongsi lain firma itu tidak bersedia bersetuju atas keputusan plaintif tetapi plaintif telah menegaskan pendirian beliau bahawa beliau tidak akan bersara. Pada 30 September 1992, plaintif telah menerima sepucuk surat bertarikh 18 September 1992 dari defendan pertama memberi plaintif notis menamatkan perkongsian itu di bawah fasal 5 perjanjian itu. Pada 14 Disember 1992, plaintif telah memfailkan suatu writ saman terhadap defendan menuntut, antara lain, suatu deklarasi bahawa notis penamatan yang bertarikh 18 September 1992 terhadap plaintif adalah batal dan tidak sah dan

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**I**

tidak dapat dilaksanakan sepenuhnya. Plaintiff juga memohon suatu perintah di bawah s 6 Akta Timbangtara 1952 ('Akta itu') bahawa tindakan ini digantung dan perbalahan di antara kedua-dua pihak dirujuk kepada timbangtara menurut fasal pengadilan di dalam perjanjian itu.

**Diputuskan**, menolak permohonan itu:

- (1) Mahkamah telah menolak bantahan oleh peguambela plaintiff bahawa defendan-defendan dengan membuat kehadiran tidak bersyarat dalam tindakan ini tidak lagi mempunyai hak memohon kepada mahkamah untuk penggantungan prosiding. Membuat kehadiran tidak merupakan dan tidak boleh disifatkan sebagai satu langkah di dalam prosiding dan di dalam kes ini, defendan boleh memohon kepada mahkamah supaya prosiding digantung di bawah s 6 Akta itu.
- (2) Isu yang dipertikaikan adalah mengenai keesahan notis penamatan itu. Ia merupakan satu soalan undang-undang yang tidak sesuai diputuskan oleh timbangtara. Pertikaian itu sepatutnya diputuskan oleh mahkamah. Tambahan pula, mahkamah berhak supaya tidak menggantung prosiding di mana perkara yang dipertikaikan itu melibatkan suatu tuduhan fraud terhadap satu pihak kepada perjanjian timbangtara itu.
- (3) Plaintiff telah memohon untuk satu perintah membubarkan perkongsian itu dan tidak terdapat kuasa membubarkan perkongsian di dalam fasal timbangtara. Oleh itu, isu itu tidak boleh diputuskan oleh timbangtara dan sepatutnya diputuskan oleh mahkamah.
- (4) Di bawah s 6 Akta itu, mahkamah mempunyai budi bicara sama ada menggantung atau tidak membenarkan penggantungan prosiding sementara menunggu keputusan timbangtara. Beban terletak pada pihak yang ingin membantah terhadap sebarang penggantungan prosiding supaya menunjuk mengapa fasal timbangtara tidak patut diberi kesan. Di dalam kes ini, mahkamah berpuas hati bahawa plaintiff telah melaksanakan beban beliau dengan menunjukkan beberapa sebab mengapa perbezaan atau isu tidak patut dirujuk kepada timbangtara.]

### Notes

For cases on the stay of proceedings pending arbitration, see 1 *Mallal's Digest* (4th Ed) paras 626-637.

### Cases referred to

- 1 *Ives & Barker v Willans* [1894] 2 Ch 478 (refd)
- 2 *Barnes v Young* [1898] 1 Ch 417 (refd)
- 3 *Wallis & Anor v Hirsch & Ors* 140 ER 131 (folld)
- 4 *Joplin v Postlethwaite* [1890] LXI The Law Times 629 (refd)
- 5 *Ford v Clarksons Holiday Ltd* [1971] 1 WLR 1412 (refd)

### Legislation referred to

Arbitration Act 1952 s 6

- A** *RK Nathan (RK Nathan & Co)* for the defendants.  
*MS Murthi (Murthi & Partners)* for the plaintiff.

**Anuar J:** This is an application by the defendants by way of summons-in-chambers (encl 4) for an order that the present action be stayed and the dispute between the parties herein be referred to arbitration pursuant to the arbitration clause in the partnership agreement ('the agreement') dated 16 April 1990 between the plaintiff and the defendants.

The defendants' application is made under s 6 of the Arbitration Act 1952.

- C** The plaintiff filed a writ of summons against the defendants dated 14 December 1992 claiming, inter alia, a declaration that the notice of termination of ownership dated 18 September 1992 against the plaintiff is null and void and wholly inoperative.

Further the plaintiff prays for an order that the firm known under the name and style of Shook Lin & Bok be ordered to be wound up.

- D** The plaintiff is a partner of the firm of solicitors practicing under the name and style of Messrs Shook Lin & Bok. The defendants are partners of the same firm.

The partners entered into a written agreement dated 16 April 1990. This agreement replaced an earlier agreement which was on identical terms. A replacement becomes necessary from time to time as and when partners retire and/or are admitted to the firm.

- E** It is contended by the defendants that the partners of the firm made a decision at a meeting held on 29 August 1992 to ask the plaintiff to retire from the partnership. The decision was conveyed to the plaintiff by the first defendant on 2 September 1992. The plaintiff told the other partners that he was not prepared to resign as suggested by them. The plaintiff further told the other partners that he would only be prepared to voluntarily step down as a senior partner of the firm within four years at a maximum from 31 December 1992.

- F** On 18 September 1992, the first defendant informed the plaintiff that the other partners of the firm were not prepared to agree to the stand taken by the plaintiff. The plaintiff, however, reiterated his position that he was not going to resign.

**G** On 30 September 1992, the plaintiff received a letter dated 18 September 1992 from the first defendant giving the plaintiff notice of termination of partnership under cl 5 of the agreement.

- H** The plaintiff disputes the validity of the notice of termination. The plaintiff contends that the notice is not valid on the ground that it does not comply strictly to the terms under cl 5 of the agreement. The plaintiff contends that the notice is in fact a wrongful and unlawful expulsion of the plaintiff as a partner and is merely a fraudulent exercise of the power of termination conferred by cl 5 of the agreement.

- I** On 14 December 1992, the plaintiff commenced action against the defendants.

The defendants contend that the matter in dispute should be referred to arbitration as provided for under cl 26 of the agreement.

This application is made under s 6 of the Arbitration Act 1952. Under s 6, it is provided that if any party to an arbitration agreement commences

any legal proceedings against any other party to the arbitration in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration, may make an order staying the proceedings.

The learned counsel for the plaintiff submitted that the defendants have entered an unconditional appearance and therefore no longer have the right to apply to the court to stay the proceedings.

The learned counsel argued that by entering an appearance, the defendants have taken a step in the proceedings. Under s 6 of the Arbitration Act 1952, the defendants may only apply to the court to stay the proceedings 'before taking any other steps in the proceedings'.

The pertinent question here is what is a 'step'. In *Ives & Barker v Willans*,<sup>1</sup> Lindley LJ said at p 484:

The authorities shew that a step in the proceedings means something in the nature of an application to the court, and not mere talk between solicitors or solicitors' clerks, nor the writing of letters, but the taking of some step, such as taking out a summons or something of that kind, which is, in the technical sense, a step in the proceedings.

It is clear to me that entering an appearance is not or cannot be regarded as a step in the proceedings.

In my view, the defendants may apply to the court for stay of proceedings under s 6 of the Arbitration Act 1952.

Now the arbitration clause reads:

26 All disputes and questions whatsoever which shall either during the partnership or afterwards arise between the partners or their respective representatives touching this agreement or the construction or application thereof or any clause or thing herein contained or any account valuation or division of assets, debts, or liabilities to be made hereunder or as to any act, deed or omission of any partner or as to any matter in any way relating to any partnership business or the affairs thereof or the right duties or liabilities of any person under the said agreement shall be referred to a single arbitrator if the parties agree upon one or in the event of disagreement to be appointed by the chairman of the Bar Council of West Malaysia for the time being in accordance with and subject to the provisions of the Arbitration Act 1952 or other written law for the time being in force.

The issue in dispute is as regards the notice of termination under cl 5 of the agreement. Under cl 5 it is provided that a notice of termination must be given by all the other partners for the time being other than the partner whose termination is sought for. In the present case, the notice of termination was not given by all the other partners. One of the partners, Rajeswaran, did not join the others to issue the notice.

The defendants contend that the issue falls within the provision of cl 26 of the agreement and it should therefore be referred to arbitration.

A The issue here is as regards to the validity of the notice of termination. It is a question of law. It is an issue which, to my mind, is not suitable to be decided by arbitration. The dispute should properly be decided by the court. (see *Barnes v Young*.<sup>2</sup>)

B The court may refuse stay of proceedings where the matter in dispute involves a charge of fraud against one of the parties to the arbitration agreement.

C In this case, the plaintiff has alleged that the defendants' 'notice of termination' is in truth and fact a wrongful and unlawful expulsion of the plaintiff as a partner. It is a fraudulent exercise of the power of termination conferred by cl 5 of the agreement. What is being alleged by the plaintiff is 'a fraud upon a power'. It is a term of art and a recognized ground to challenge the exercise of such power. The plaintiff has set out in his claim the various grounds for the allegation of fraud. The particulars of fraud are to be found in para 7 of the statement of claim.

D In my view, this is a dispute which is outside the arbitrator's power to decide. It is therefore not the type of dispute that should be referred to an arbitrator.

E In the case of *Wallis & Anor v Hirsch & Ors*,<sup>3</sup> Cockburn CJ refused an application for stay of proceedings where the plaintiff bona fide alleged that the question raised is one of fraud. Applying the same principle, the present case should not be referred to arbitration and the application for stay ought to be refused.

F An arbitrator derives his authority from the agreement between the parties and that consequently, his powers and duties are those and only those that the parties have agreed to place upon him. Accordingly, if an arbitrator has no authority at the time of his original appointment to do any act, then he has no greater authority later to agree to waive objection to that act having been done. (See *Russell on Law of Arbitration* (18th Ed) p 175).

G One of the prayers asked for by the plaintiff is for an order of dissolution of the partnership. The power to dissolve the partnership is not in the agreement neither is it mentioned in the arbitration clause. I am of the view that the issue does not come within the scope of the arbitration clause or arising out of the agreement. The issue of whether the partnership should be dissolved or not therefore cannot be decided by arbitration. It should be decided by the court. (See *Joplin v Postlethwaite*.<sup>4</sup>)

H Under s 6 of the Arbitration Act 1952, the court has a discretion either to stay or refuse a stay of proceeding pending arbitration. The onus is on the party who wish to object to any stay of proceeding to show why the arbitration clause should not be given effect. In this case, the onus is on the plaintiff to show why the matter should not be referred to arbitration.

I In the present case, I am satisfied that the plaintiff has demonstrated several reasons why the difference/issues should not be referred to arbitration. (See *Ford v Clarksons Holidays Ltd*.<sup>5</sup>)

I For the above reasons, I would dismiss this application (encl 4) with costs.

*Application dismissed.*